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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1458

MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Petitioner,

v.

ALTON RINIER, as Agent for Certain Employees of Bankrupt; ANSWERING EMPLOYEES OF BANKRUPT; LOCAL 807-IBT; RETAIL CLERKS INTERNATIONAL ASSOCIATION; and NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	3
Statutes Involved	3
Question Presented	4
Statement of the Case	4
REASONS FOR GRANTING THE WRIT	8
I—The Decision Below Undermines Bankruptcy's Fundamental Concept and Legislative Scheme of Equality of Distribution	9
II—The Decision Below Conflicts With Decisions of the Courts of Appeals for the First and Third Circuits	13
Conclusion	17

APPENDICES*

Appendix I (Opinion and Judgment of the Court of Appeals)	4a
Appendix II (Decision and Order of the District Court)	9a
Appendix III (Decision and Order of the Bankruptcy Court)	23a
Appendix IV (*In re Hotel Circle, Inc.*, Decision of the Ninth Circuit, Jan. 21, 1980)	33a

* The appendix material is contained in the separately bound Joint Appendix filed on behalf of both petitioner Morgan Guaranty Trust Company of New York and petitioner Charles G. Rodman, as Trustee of the Estate of W. T. Grant Company, Bankrupt.

TABLE OF AUTHORITIES

Cases

	PAGE
In re The Bohack Corp., 535 F.2d 1240 (2d Cir. 1975), *cert. denied*, 425 U.S. 966	14
In re Capital Services, Inc., 136 F. Supp. 430 (N.D. Cal. 1956)	11
In re Diamond Reo Trucks, Inc., 20 Collier Bankr. Cases 1130 (W.D. Mich. 1979)	9, 16, 17
In re Hotel Circle, Inc., docket no. 76-3066 (9th Cir. Jan. 21, 1980)	4
In re Le Maire Machine Tool Co., [1962-1966 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 61,577 (E.D. Mich. 1965)	11
In re Mammoth Mart, Inc., 536 F.2d 950 (1st Cir. 1976)	7, 9, 14, 15, 16
In re Polaris Industries, Inc., [1973-1975 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 65,082 (D. Tenn. 1974)	10
Pomper v. *United States*, 196 F.2d 211 (2d Cir. 1952)	11
In re Public Ledger, Inc., 161 F.2d 762 (3d Cir. 1947)	7, 9, 16
In re Rothman, 14 F. Supp. 241 (S.D.N.Y. 1936)	11
In re Ruffsdale Distilling Co., [1938-1941 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 52,773 (E.D. Pa. 1940)	10
Straus-Duparquet, Inc. v. *Local No. 3, IBEW*, 386 F.2d 649 (2d Cir. 1967)	*Passim*
In re Unishops, Inc., 553 F.2d 305 (2d Cir. 1977)	14
In re Walsh, [1973-1975 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 65,349 (W.D. Wis. 1973)	10
Wheeling Electric Co. v. *Mead*, 177 F.2d 718 (4th Cir. 1949)	10

Statutes

	PAGE
Bankruptcy Act, ch. 541, § 64a, 30 Stat. 563 (1898) (as amended)	2, 13
Bankruptcy Reform Act of 1978 § 503, 11 U.S.C. § 503 (1979)	3
Bankruptcy Reform Act of 1978 § 507, 11 U.S.C. § 507 (1979)	3, 13

Legislative Materials

Annual Reports of the Director of the Administrative Office of the United States Courts for the Years 1976-1978	9
Hearings before the Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, 10 Resnick and Wypyski, *Bankruptcy Reform Act of 1978—A Legislative History* (1979)	13
Report of the Committee on the Judiciary, House Report No. 95-595 (Sept. 8, 1977), [1978] U.S. Code Cong. & Ad. News, vol. 5	13

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Petitioner Morgan Guaranty Trust Company of New York ("Morgan Guaranty") prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, affirming an order of the United States District Court for the Southern District of New York, which in turn affirmed an order of the Bankruptcy Court for the Southern District of New York. The Second Circuit's judgment continues and extends a rule of bankruptcy administration that has been rejected by each of the two other Circuits which have considered the issue.

The Second Circuit held with respect to thousands of employees terminated during the brief Chapter XI phase of the W. T. Grant Company's total liquidation bankruptcy—the largest corporate liquidation in the history of the

United States—that the full amount of their severance pay, even though earned over many years' employment, was required to be classified in its entirety as a first priority expense of administration rather than be allocated over the term of employment. As a result, such severance pay stands to be paid in full, to the direct prejudice of general creditors of the Grant bankrupt estate, in particular a group of Grant's lending banks led by Morgan Guaranty. The Second Circuit's holding is in flat contradiction of the principle of equal distribution of assets among creditors of a bankrupt, and it is in acknowledged conflict with holdings of the First and Third Circuits.

Because the conflict among the Circuits bears directly on the balancing of priority claims against the claims of general creditors, the conflict is one which has been and will continue to be material in each of the some 4,000 corporate insolvency proceedings filed each year in the Federal courts. The new Bankruptcy Code works no change that resolves the conflict, so that the issue promises to remain.

Until resolved, this point of bankruptcy law will hinder already protracted bankruptcy proceedings and will necessitate further appellate review in other Circuits. Resolution of the issue now by this Court will be of evident benefit to the administration of bankruptcy courts and the prompt handling of corporate insolvency proceedings.

Opinions Below

The opinion and judgment of the Second Circuit was filed January 3, 1980 and has not yet been reported. It is set forth in Appendix I. The decision and order of the District Court dated July 18, 1979, which was affirmed by the Second Circuit, is reported at 474 F. Supp. 788 (S.D. N.Y. 1979) and is set forth in Appendix II. The decision and order of the Bankruptcy Court dated June 22, 1978, which was affirmed by the District Court, is set forth in Appendix III.

Jurisdiction

The judgment of the Court of Appeals was entered on January 3, 1980. No petition for rehearing was filed. The jurisdiction of this Court is based upon 28 U.S.C. § 1254(1) and Section 24c of the Bankruptcy Act, 11 U.S.C. § 47c.

Statutes Involved

The relevant portion of the Bankruptcy Act, ch. 541, § 64a, 30 Stat. 563 (1898) (as amended), which governs this case, provides:

> "(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; . . . (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding. . . ."

The parallel provisions contained in the new Bankruptcy Code are, *first,* Sections 507(a)(1) and (3), 11 U.S.C. §§ 507(a)(1) and (3) (1979), which provide:

> "(a) The following expenses and claims have priority in the following order:
>
> (1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28. . . .
>
> • • •
>
> (3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance and sick leave pay—
>
> (A) earned by an individual within 90 days before the date of the filing of the petition or the

> date of the cessation of the debtor's business, whichever occurs first; but only
>
> (B) to the extent of $2,000 for each such individual . . .;"

and, *second,* Section 503(b) of the Bankruptcy Code, 11 U.S.C. § 503(b) (1979), which provides in part that:

> "(b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including—
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case; . . ."

Question Presented

Is severance pay, earned in respect of many years' employment and dependent in amount on the length of that employment, payable in full as a first priority expense of administration because the termination of employment occurs during the Chapter XI portion of a liquidation bankruptcy?*

Statement of the Case

On October 2, 1975 W. T. Grant Company filed a petition for an arrangement under Chapter XI of the Bankruptcy

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* This case also raises an important question of bankruptcy procedure regarding the standards for the assumption of executory contracts by troubled debtors, as to which the decision below conflicts with a recent decision of the Ninth Circuit, *In re Hotel Circle, Inc.,* docket no. 76-3066 (9th Cir. Jan. 21, 1980), set forth in Appendix IV. We do not address that question in this brief, but respectfully adopt the argument in the companion petition of the Grant Trustee which primarily addresses that issue.

Act.* Grant had operated a chain of over 1,000 retail outlets for the sale of general lines of merchandise. To try to save a nucleus of the company's stores, 715 outlets were promptly liquidated and closed during the first three months of the Chapter XI case, and over 35,000 employees were let go. The effort to salvage the remainder of the company failed, and the rest of the stores were ordered liquidated on February 12, 1976. The remaining employees were discharged during the next two months, and Grant was adjudged a bankrupt on April 13, 1976.

Prior to its Chapter XI petition, Grant had offered its employees a wage and compensation package which included severance pay benefits dependent on each employee's period of employment. As the employment period increased, the amount of severance pay benefits for involuntary termination also increased. Not all of Grant's employees were covered by identical severance pay provisions, but the basic provisions were uniform for all employees. The company's basic severance pay provisions typically provided:

Length of Service	Termination Amount
Up to 6 mos.	No pay but reasonable notice
6 mos.-11 mos.	10% of week's salary for each month over 6 mos.
1-3 yrs.	1 week's pay
3-5 yrs.	2 weeks' pay
5-7 yrs.	3 weeks' pay
7-10 yrs.	4 weeks' pay
Over 10 yrs.	Specially calculated by management

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* The Bankruptcy Act, ch. 541, 30 Stat. 544 (1898) (as amended), will be referred to herein as the "Act". The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 1 to 151326 (1979)), will be referred to herein as the "Code".

Severance pay was never paid by Grant as debtor-in-possession to its employees discharged during the Chapter XI store closings and liquidation. On April 8, 1976, in the final days of the Chapter XI case, after all stores had been closed and when it was known that the company would be adjudged a bankrupt on April 13, Grant for the first time obtained an order fixing April 27, 1976 as a hearing date to consider an application for authority to make severance payments to discharged employees. That application lapsed following Grant's adjudication as a bankrupt and was not adopted by the Trustee of the Grant estate.

Instead, after receipt and analysis of 41,000 employee claims for severance pay benefits totalling in excess of $20,000,000,* the Trustee made his own application to the Bankruptcy Court on May 10, 1977 for instructions as to their treatment. Since Grant's wage and compensation package had provided that the amount of severance pay was based on the duration of each employee's employment, the Trustee proposed that: (a) the portion of a discharged employee's severance pay claim relating to his employment between the commencement of the Chapter XI case and the date of his discharge be paid in full as a cost and expense of administration under Section 64a(1) of the Act; (b) the portion of the claim relating to his employment during the three months prior to the commencement of the Chapter XI case be paid under the second priority contained in Section 64a(2) of the Act (not in excess of $600 per claimant); and (c) the balance of the claim be treated as a pre-Chapter XI non-priority unsecured claim. The Trustee further proposed that each employee's total severance pay be allocated over a common 12-month period in order to be more generous to employees.

Morgan Guaranty, acting as agent for twenty-six banks constituting Grant's principal lenders, endorsed this allo-

* Some 28,000 valid claims totalling approximately $11,382,000 were left after elimination of duplications.

cation and objected to any plan in excess of the Trustee's proposal.* Objections to the proposal were interposed by the respondents, who claimed that all severance pay should be paid 100% as an administration expense. After a hearing, the Bankruptcy Court noted in its opinion that two Circuits adhered to the allocation of severance pay in a manner similar to the Trustee's proposal, citing *In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976), and *In re Public Ledger, Inc.*, 161 F.2d 762 (3rd Cir. 1947). While the Bankruptcy Court found allocation to be "appealing", Appendix III at 28a, it concluded that it was "bound" by the decision of the Second Circuit in *Straus-Duparquet, Inc.* v. *Local No. 3, IBEW*, 386 F.2d 649 (2d Cir. 1967), quoting that decision as follows:

> " '[s]everance pay is not earned from day to day and does not 'accrue' so that a proportionate part is payable under any circumstances. After the period of eligibility is served, the full severance pay is due whenever termination of employment occurs.' 386 F.2d at 651." Appendix III at 28a.

The District Court, whose jurisdiction was invoked under 28 U.S.C. §§ 1334 and 1331, affirmed, agreeing that it, too, was bound by the Second Circuit's rule of *Straus-Duparquet*. Appendix II at 13a-14a.

The Second Circuit affirmed in a short opinion acknowledging that other Circuits differed from "the law of this Circuit" and holding that "we reaffirm and adhere to our decision in *Straus-Duparquet* . . . and hold that the entire portion of the employees' severance pay claims is entitled

* The ultimate recovery of the bank group and of general unsecured creditors is estimated in the range of 50%. The Trustee's allocation formula for severance pay would result in an average payment of over 80% per severance pay claim, because both the administration and the second priority portions would receive 100% payment, while only the general unsecured portion would received the 50% payment. The Trustee thus sought to save some $2 million for Grant's general estate by his severance pay proposal.

to first priority as costs and expenses of administration." Appendix I at 6a.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision is judicial legislation at variance with a set and express statutory scheme. It makes an anomaly of severance pay claims by giving them the pre-eminent status accorded to necessary expenses of actual bankruptcy administration. Notwithstanding the Act's and the new Code's express relegation of a portion of wages to a lower priority and of the remainder to unsecured status, the decision permits what are in reality prepetition obligations of the debtor to leap-frog to the highest priority of claims. This confuses the statutory scheme of the Act and contradicts the fundamental concept of bankruptcy, equality of asset distribution.

The Court of Appeals' decision will continue this confusion under the new Code, since the rationale of the decision turns on a classification—"administration expenses"—which is found in the new Code as well as in the old Act. For the same reason, the decision affects both reorganizations and liquidations, both of which incorporate the concept of administration expenses.

Furthermore, the decision of the Court of Appeals is in acknowledged conflict with decisions of the Courts of Appeals for the First and Third Circuits, *In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976), and *In re Public Ledger, Inc.*, 161 F.2d 762 (3d Cir. 1947). Those cases require the allocation of severance pay benefits and the classification of such benefits as a first priority administration expense only to the extent of actual employment during the Chapter XI period.* Since this conflict will continue to exist under the new Code, future treatment of severance pay benefits will vary according to the district where a debtor files its petition, and benefits will be enhanced or diminished by a debtor's choice of forum.

* Another court has recently addressed the issue. A Bankruptcy Court in the Seventh Circuit carefully reviewed the decisions of the First, Second and Third Circuits and concluded that the rationale of the First and Third was "far superior to that in *Straus-Duparquet, Inc.*" *In re Diamond Reo Trucks, Inc.*, 20 Collier Bankr. Cases 1130, 1138 (W.D. Mich. 1979).

Resolution of the issue is above all important for the efficient administration of the affairs of insolvent corporate debtors, whether in reorganization or liquidation. Corporate reorganization petitions have averaged some 4,000 petitions per year in recent years, with the bankruptcy courts administering billions of dollars in corporate assets.* Such a clear dispute in Circuit Court authority will inevitably generate controversy in the courts on the treatment of severance pay in any major corporate insolvency, whatever the composition of the class of general creditors. Confusion and court delay serve neither the interest of employees nor the interests of creditors as a whole, whether they are banks, trade creditors, holders of public debt, or any of the other people or entities who regularly extend credit to corporate employers.

I

The Decision Below Undermines Bankruptcy's Fundamental Concept and Legislative Scheme of Equality of Distribution.

The fundamental concept of bankruptcy is equality of asset distribution among creditors, all of whom must take some loss on their transactions but each of whom may thus share the loss in common with all other creditors. The few exceptions for priority claims provided in the Act and in the new Code are exceptions which are carefully limited, precisely because they run counter to the rule of equality of distribution. The exception having first priority, that for costs and expenses of administration, is restricted to

* *See, e.g.*, Table F-2 (Voluntary and Involuntary Filings) in the Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1976 through 1978. The inclusion of non-corporate merchant and manufacturing bankruptcies more than doubles this figure. *Id.*, Table F-3.

those claims which arise during the period of reorganization and which, in the language of the Act, "includ[e] the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition."

Costs and expenses of administration are therefore paid in full before any other creditor receives anything, even including other priority creditors. The reason is that, if a reorganization bankruptcy is to have any chance of success, those dealing with the debtor-in-possession must know that obligations incurred by the ailing company during the reorganization have a realistic chance of payment. Any other rule would preclude the day-to-day functioning of the debtor and its collapse would be virtually assured.

Administration priority has thus consistently been held to apply only to items which have to be paid in order for the debtor to operate while it attempts to deal with its prepetition creditors. Examples are rent for the reasonable use and occupancy of premises after the filing of the petition, *e.g., In re Polaris Industries, Inc.*, [1973-1975 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 65,082 (D. Tenn. 1974); warehouse space for post-filing storage, *e.g., In re Walsh*, [1973-1975 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 65,349 (W.D. Wis. 1973); insurance during a receivership to cover loss of assets, *e.g., In re Ruffsdale Distilling Co.*, [1938-1941 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 52,773 (E.D. Pa. 1940); and utility bills for electricity supplied after the filing, *e.g., Wheeling Electric Co.* v. *Mead*, 177 F.2d 718 (4th Cir. 1949). The rationale of these and many similar cases is the actual need to expend some guarded portion of the funds of the bankrupt in order to preserve or administer the limited resources left after a bankruptcy filing.

The same rationale has been consistently followed in all areas of wages, with the sole exception of severance pay, and even there only in the Second Circuit. Wages themselves are paid as administration expenses solely for work performed after the filing, *e.g., In re Le Maire Machine Tool Co.*, [1962-1966 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 61,577 (E.D. Mich. 1965). Vacation pay is an administration expense only for vacation earned post-filing, *e.g., In re Capital Services, Inc.*, 136 F. Supp. 430 (N.D. Cal. 1956)* The compensation of attorneys, accountants and other professionals retained by the bankrupt is paid as an administration expense only for what they do after filing, *e.g., In re Rothman*, 14 F. Supp. 241 (S.D.N.Y. 1936).

Even the tax withholding portions of wage payments are generally accorded first priority treatment only to the extent that the underlying wages are for post-filing services, *e.g., Pomper* v. *United States*, 196 F.2d 211 (2d Cir. 1952). In that case the Second Circuit rejected the government's contention that a full year's unemployment tax was entitled to administration priority because it happened to accrue after the date of the debtor's Chapter XI filing:

> "The employer's tax [on wages] at any given time in the taxable period can be accurately computed through multiplying by [the applicable tax rate] the aggregate wages paid to employees up to that time. The mere fact that the tax is not due until the year's end does not detract from the fact that it is incurred in a readily ascertainable amount as the wages are paid out . . . . Such a flexibility in computing and dividing the annual payroll tax . . . is not compatible with the United States' contention that, because the tax is imposed for a 'taxable year' or 'calendar year,' it is an inherently unsplit-upable unit." 196 F.2d at 213.

There is no reason to treat severance pay any differently. Earned over many years' employment in amounts

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* Indeed, vacation pay to Grant's employees was authorized on an allocated basis at the same hearing at which the Bankruptcy Court considered severance pay claims, in accordance with the Second Circuit's rule for the allocation of vacation pay in *Straus-Duparquet*. *See* Appendix III at 30a-31a.

directly related to service with the company long preceding the reorganization period, it cannot be said to constitute funds necessarily expended in order to preserve or administer a bankrupt's limited resources.

Indeed, there is an affirmative reason why severance pay should not be held to accrue all at the moment of termination. As this case demonstrates, severance pay can be a substantial obligation of the debtor. The Second Circuit's rule means that it is an obligation which will always have to be paid in full if a debtor does not terminate its employees prior to filing, thereby "accruing" the debt before the filing date. This is unworkable as a practical matter for a company needing the protection of bankruptcy for rehabilitation. Under the Second Circuit rule, if employees are kept one day past filing, their severance pay is automatically an administration expense in its entirety. Thus, the debtor must immediately opt between wholesale firings and assumption of a massive and possible crippling burden.

The Second Circuit exacerbated the dilemma by adopting the District Court's suggestion that Grant realized it might have lost its entire work force, defeating any hope for rehabilitation, had it announced at once that no severance pay would be recognized after the Chapter XI filing (Appendix I at 5a). That suggestion runs contrary to logic and human nature and has no support in the record. Employees continuing to earn full salaries stay with a troubled company like Grant to keep their jobs and to avoid being out of work. The fact that a portion of severance pay may be paid less than 100% in the event of liquidation is of minor importance.

If as a matter of policy the former employees of a failed company are to be given such extraordinary special treatment, that is a matter for legislation. Indeed, there is such legislation: both the Act, in Section 64a(2), and the new Code, in Section 507(a)(3), explicitly provide a lower priority for wages and certain employee benefits,

including explicit reference to severance pay in the latter. Under the rule enunciated by the Second Circuit, however, that legislation is ignored.*

II

The Decision Below Conflicts With Decisions of the Courts of Appeals for the First and Third Circuits.

In its decision below, the Second Circuit refused to depart from its earlier decision in *Straus-Duparquet, Inc.* v. *Local No. 3, IBEW*, 386 F.2d 649 (2d Cir. 1967). There the court had held, as a matter of first impression in the Second Circuit but contrary to precedent elsewhere, that severance pay accrued entirely upon an employee's termination and therefore such pay, when based on discharge after a Chapter XI filing, was payable in full as an expense of administration.

In *Straus-Duparquet,* such a result carried a certain equitable force. Forty-three terminated employees had been employed at one unprofitable division of the company. Their severance pay claims amounted to $8,069.41. The division was shut down in 1965 and the employees were let go, but there was no other shut-down of the business, no full-scale liquidation of assets to salvage some percentage for creditors, and the company had emerged from a suc-

* According to the legislative history, Congress believed it was codifying existing law in enacting the Code provisions on severance pay and explicitly linking those provisions to allocation. In the relevant hearings, subcommittee witnesses described severance pay as being "similarly calculated" to vacation pay, citing allocation examples. 10 Resnick and Wypyski, Bankruptcy Reform Act of 1978—A Legislative History (1979) at 297 ("Statements before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary"). Similarly, the inclusion of severance pay among the third priority claims under Section 507 was considered to be an "expansion" of existing law, indicating that Congress contemplated allocation of severance pay claims. Report of the Committee on the Judiciary, House Report No. 95-595 (Sept. 8, 1977) at 357, *reprinted in* [1978] U.S. Code & Cong. Ad. News. vol. 5, p. 6313.

cessful reorganization by the time the matter reached the District Court in 1966. The rest of the employees stayed on with their vacation and severance pay and other benefits, and indeed their jobs, unaffected.

Unlike the Grant bankruptcy, where everyone has been let go, the few terminated employees in *Straus-Duparquet* would have received grossly unequal treatment if their severance pay had been allocated. Preserving their severance pay in full helped to keep them on a parity with employees who had been retained.*

With its decision below, the Second Circuit has stretched the *Straus-Duparquet* rule to the farthest extent, beyond that permitted by the Bankruptcy Act or any equitable considerations, to the point where it cannot be reconciled with decisions in other Circuits, as the Second Circuit acknowledged in its opinion.

In re Mammoth Mart, Inc., 536 F.2d 950 (1st Cir. 1976), which the Second Circuit refused to follow, had criticized and rejected the rule set down in *Straus-Duparquet*. 536 F.2d at 953. Like Grant, Mammoth Mart radically con-

* In the Second Circuit progeny of *Straus-Duparquet, In re The Bohack Corp.*, 535 F.2d 1240 (2d Cir. 1975), *cert. denied*, 425 U.S. 966 (1976), and *In re Unishops, Inc.*, 553 F.2d 305 (2d Cir. 1977), that court adhered to its rule. Neither *Bohack* nor *Unishops*, however, was a terminal Chapter XI situation. In *Bohack* the court upheld the applicability of *Straus-Duparquet* to the termination of particular union employees discharged in an effort to rehabilitate the company. The petition for certiorari in *Bohack*, which was denied on May 3, 1976, relied mainly on the conflict with the decision of the Bankruptcy Court in the First Circuit in *In re Mammoth Mart*. The First Circuit itself did not hand down its decision in *Mammoth Mart* until June 18, 1976. Even so, Justices Stewart, White and Blackmun voted to grant certiorari in *Bohack*. 425 U.S. at 966. In *Unishops*, the court noted in dictum that *Straus-Duparquet* stood for the proposition that severance pay is "usually an expense of administration in a Chapter XI case." 553 F.2d at 308 n.1. *Unishops* involved an employment contract for only a single executive, and the company did better by paying severance pay than it would have by honoring the full contract.

tracted its retail chain during the Chapter XI period, in the process discharging a large number of employees who had earned severance pay in amounts dependent on each employee's period of service. The discharged employees there received the full amount of the portion of their severance pay allocable to the Chapter XI period. But they came back and sought first priority treatment for the pre-filing portion on the basis of *Straus-Duparquet*. Pointing out that "no part of [the pre-filing] claims arises from services performed for the debtor-in-possession," the First Circuit refused to allow first priority to the prepetition part:

> "[A] debt is not entitled to priority as a cost and expense of administration simply because the claimant's right to payment arises after the debtor-in-possession has taken some action. . . . It is only when the debtor-in-possession's actions themselves—that is, considered apart from any obligation of the debtor—give rise to a legal liability that the claimant is entitled to [administration expense] priority." 536 F.2d at 955.

The First Circuit went on to state that it "strongly doubt[ed]" that the contrary rule of *Straus-Duparquet* is consistent with "§ 64a(2)'s provision [for] wages earned during the three months prior to the filing of the petition. . . ."

> "The [Straus-Duparquet] rule would undermine . . . the Congressional scheme. Under it, individuals could, based solely on their relationship with the debtor, recover 'severance pay' in excess of $600 and subject to no maximum. Moreover, they would recover these claims ahead of bona fide wage claims of other former employees (possibly exhausting the bankrupt's assets in doing so). . . ." 536 F.2d at 955-56.

The First Circuit in *Mammoth Mart* relied on *In re Public Ledger, Inc.*, 161 F.2d 762 (3d Cir. 1947). In *Public Ledger*, there were two employment contracts at issue. One provided for severance pay as an alternative to notice, without reference to length of service. In that instance the Third Circuit held that severance pay accrued entirely on termination without notice and so was entitled to administration expense priority. Under the second contract, however, severance pay was predicated on longevity of service, and so the amount earned each day was held to "mature in time to the status of a due debt," 161 F.2d at 773. Accordingly, the Third Circuit held that the priority components of each claim were to be prorated on a daily basis according to the period when the right to a portion of severance pay was earned. *Id.*

The Bankruptcy Court for the Western District of Michigan has recently evaluated the conflict among the Circuits as follows:

> "I believe the rationale set forth in *In re Public Ledger*, supra, and *In re Mammoth Mart, Inc.*, supra, to be far superior to that in *In re Straus-Duparquet, Inc.*, supra. The purpose of a Chapter XI proceedings is to rehabilitate the debtor. Creditors who deal with the debtor-in-possession are accorded a priority as an administrative expense under Section 64a(1). To accord employees who accrue benefits throughout their term of employment the same status for all accumulated benefits simply because they are terminated during the Chapter proceedings is unfair to other creditors who dealt with the debtor before and during the proceedings. Congress has accorded employees protection for wages under Sec. 64a(2), albeit somewhat conservative. This ha[s] been cured to a large extent under the new Bankruptcy Act which takes effect on October 1, 1979, and accords priority status to a maximum of

> $2,000.00, Section 507, 11 U.S.C. Sec. 507." *In re Diamond Reo Trucks, Inc.*, 20 Collier Bankr. Cases 1130, 1138 (W.D. Mich. 1979)

The Bankruptcy Court and the District Court below were bound by the Second Circuit decision in *Straus-Duparquet* and so did not have the flexibility of the court in *Diamond Reo*. The Bankruptcy Court below nevertheless saw fit to comment that the *Mammoth Mart* approach was "appealing" and "consistent with the equitable principles of the Bankruptcy Act" (Appendix III at 28a).

We submit that the Second Circuit's rule is incorrect—both unworkable as a tool of debtor protection and contrary to the mandate of the Act and the new Code. Allocation is consistent with the law in other Circuits, with the language of the Code and with the concept of administration priorities.

CONCLUSION

Because of the effect of this decision on bankruptcy administration and the conflict among the Circuits, petitioner Morgan Guaranty Trust Company of New York prays that a writ of certiorari issue to review the judgment of the Court of Appeals.

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Respectfully submitted,

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